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No. 10- 10-205

IN THE

Supreme Court of the United States

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Petitioners,

– v. –

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAURA G. WEISS, ESQ.
LAW OFFICES OF
LAURA G. WEISS
One Blue Hill Plaza
Pearl River, NY 10965

MAXWELL M. BLECHER, ESQ.
JOHN E. ANDREWS, ESQ.
BLECHER & COLLINS, P.C.
515 South Figueroa Street
Suite 1750
Los Angeles, CA 90071

SHALOM D. STONE, ESQ.
ROBERT J. DONAHER, ESQ. *
STEVEN D. GROSSMAN, ESQ.
WALDER, HAYDEN
& BROGAN, P.A.
5 Becker Farm Road
Roseland, NJ 07068
(973) 992-5300

**Counsel of Record*

Counsel for Petitioners

COUNSEL PRESS
(800) 274-3321 (800) 359-6859

QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying a heightened summary judgment standard that misconstrues *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 451 (1986), and ignores *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), by requiring summary judgment in an antitrust conspiracy case where the parties' positions are found to be "equally plausible," and the defendants' claim to "independent action" involves them advancing and benefitting consciously from unlawful and inherently anticompetitive conduct.

2. Whether the court of appeals improvidently encroached upon the province of a jury, and violated fundamental strictures of summary judgment jurisprudence, by improperly weighing and deconstructing evidence and denying plaintiffs the benefit of reasonable inferences on the grounds that each piece of evidence was susceptible to competing inferences favorable to the defense.

PARTIES TO THE PROCEEDING

1. U.S. Information Systems, Inc. ("USIS"), Odyssey Group, Inc. and Blue Diamond Fiber Optic Networks, Inc. ("Blue Diamond") (collectively "plaintiffs" or "Petitioners") are Petitioners before this Court and were the plaintiffs/Appellants below.

2. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, and Local 3 signatory contractors ADCO Electrical Corporation, Five Star Electrical Corporation ("Five Star"), Nead Information Systems ("Nead"), Hugh O'Kane Electric Company, LLC ("Hugh O'Kane"), A&R Electrical, Maintenance, Inc., Forest Electric Corporation ("Forest"), IPC Communications, Inc. ("IPC") and A R Communications Contractors, Inc., are the Respondents here and were the defendants below (collectively "Respondents" or "defendants").*

RULE 29.6 DISCLOSURE

None of the Petitioners has a parent company and no publicly held company owns 10% or more of the shares of the stock of any Petitioner.

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* Except that Forest and IPC have settled and are thus not participating in this application.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals, as entered on February 19, 2010, is reprinted in the Appendix at pages 1a–5a. The order of the Court of Appeals denying rehearing and rehearing as entered on May 12, 2010, *en banc*, is reprinted at pages 56a–57a. The decision and order of the district court granting summary judgment entered on September 18, 2007 is reprinted in the Appendix at pages 6a–12a. The Report and Recommendation of James C. Francis IV, Magistrate Judge, entered on August 3, 2007, is reprinted in the Appendix at pages 13a–55a.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on February 19, 2010. The Court of Appeals denied Petitioners' timely petitions for rehearing and rehearing *en banc* on May 12, 2010. App. 56a–57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Rule 56 of the Federal Rules of Civil Procedure. These provisions are set forth in App. E 56a-62a.

STATEMENT OF THE CASE

This petition presents significant and still unanswered questions concerning the standard for summary judgment in an antitrust conspiracy case. These questions arise in a novel context outside the familiar realm of predatory and oligopoly price coordination and in connection with a factually and theoretically plausible conspiracy for which there is no benign or socially redeeming explanation. The conspiracy encompasses facially anticompetitive and egregious criminal conduct, including extortion. App. C 51a. It was acknowledged below that this conduct benefited the defendants competitively and economically by thwarting lower priced competition posed by the plaintiffs. It is virtually certain that, inherently and by design, the conduct has resulted in artificially inflated prices in a discrete and economically significant market. App. C 48a–49a.

This petition exemplifies how misinterpreting *Matsushita*'s "tends to exclude" standard to require direct evidence of conspiracy in inappropriate factual and legal contexts leads to encroachment upon the fact-finding province of a jury, and abrogates the most fundamental precept of summary judgment jurisprudence that all reasonable inferences should be drawn in favor of the non-moving party. The courts

below held that the range of permissible inferences was limited by antitrust law to those which could be drawn unequivocally in plaintiffs' favor from individual pieces of evidence dismembered from the whole of plaintiffs' case. The focus was on whether *any* competing inferences could be drawn in defendants' favor, rather than on the reasonableness or probative value of the inferences favoring plaintiffs. It was from this misguided perspective that it was determined below that the respective positions of the parties were "equally plausible," and that, accordingly, the case could not be permitted to proceed to trial. App. C 51a.

This case involves a market and an industry which have proven historically to be highly conducive to collusion, and a notorious trade union, Local 3 of the International Brotherhood of Electrical Workers ("Local 3"), which has defied federal law and been the catalyst for anticompetitive and exclusionary trade practices for well over a half a century. Plaintiffs, as victims, have been damaged competitively from a conspiracy among the defendants to exclude lower priced competition in the multi-billion dollar market for the installation of low voltage cable and fiber for telephone data and video service ("tel-data") on major construction projects in the New York City Metropolitan area.

The challenged collusive and anti-competitive practices in this case are similar to those that were engaged in by the same union and found to violate the antitrust laws by the Court sixty-five years ago in its seminal decision in *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945). The challenged practices

include threats, work stoppages and vandalism as part of an aggressive and coordinated campaign among Local 3 and its signatory contractors to prevent firms using less costly and more qualified labor provided by the Communications Workers of America ("CWA") from obtaining tel-data work on major New York City construction projects. As in *Allen Bradley*, the campaign in this case is one of fear and intimidation aimed at fostering an industry wide understanding as to the nature of Local 3's jurisdictional claim and coercive demands for exclusive dominion over the relevant tel-data market and the consequences for those who fail to accede to those demands.

The defendants' tactics succeeded, not only in preventing more qualified CWA contractors with more competitive bid proposals from winning or even being considered for tel-data contracts, but also in persuading customers to cancel or rescind contracts that had already been awarded to CWA contractors after work had begun. Such conduct, even had it been engaged in by Local 3 or the contractors independently, is illegal under prevailing and directly analogous authorities which hold that refusals to deal or exclusive dealing arrangements coerced by threats of labor disruptions violate Section 1 of the Sherman Act, as well as federal labor laws. *See, e.g. MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967 (7th Cir. 1995); *Altemose Constr. Co. v. Atl. Cape May*, 493 F. Supp. 1181 (D.N.J. 1980); *C&W Constr. Co. v. Bhd. of Carpenters & Joiners of Am., Local 745*, 687 F. Supp. 1453 (D. Haw. 1988).

The factual and legal context of plaintiffs' claims below included Local 3's unparalleled record of

unlawful and recidivist secondary boycott activity, much of it directed to the enforcement of the union's "total job" policy. *Local 3, IBEW v. Gen. Dynamics Commc'ns Co.*, 264 N.L.R.B. 705, 709–10 (1982) *aff'd. mem.*, 742 F.2d 1438 (2d Cir. 1983); *see also Silverman v. Local 3, IBEW*, 81 Civ. 6936, 1981 WL 2234 (S.D.N.Y. Dec. 23, 1981). Local 3's relentless pursuit of this policy, specifically to keep CWA contractors out of the tel-data market through work stoppages, vandalism and violence, has been documented by a series of adverse adjudications by the National Labor Relations Board ("NLRB") and the federal courts. *See NLRB v. Local 3, IBEW*, 861 F.2d 44, 45–46 (2d Cir. 1988); *NLRB v. Local 3, IBEW*, 730 F.2d 870, 880 (2d Cir. 1984) (additional citations omitted).

Summary judgment was granted in this case without accounting for Local 3's recalcitrant history, or considering the ease with which a trade union with Local 3's reputation and track record could have facilitated collusion and concerted action amongst contractors with whom it shared key decision-making and management personnel, common economic interests and a motive to conspire.

I. FACTUAL BACKGROUND

Virtually all large commercial construction projects in New York City use only union labor. The various components of these projects are competitively bid as subcontracts and, absent unusual circumstances, awarded to the pre-qualified contractor submitting the lowest bid. Petitioners are contractors specializing in the installation of tel-data

cable and fiber who employ members of the CWA. Respondents are Local 3 and several major electrical contractors who employ Local 3 labor. Traditionally, Local 3 has specialized in the installation of high voltage electrical cable ("electrical work") and such work has come under its exclusive jurisdiction. With the emergence of the telecommunications market, Local 3 has sought to establish exclusive dominion over tel-data installation work as well. Claims by Local 3 for exclusive jurisdiction over that work, nevertheless, have been rejected repeatedly by the NLRB.

For a variety of reasons, including relative risk, CWA tel-data technicians command a lower wage than Local 3 electricians. However, CWA contractors specialize in and employ specially trained workers, and thus are inherently more qualified than conventional contractors. Because they are not bound by the Local 3's higher wage scales, CWA contractors are able to significantly underbid Local 3 contractors by as much as 30%. With CWA contractors offering equivalent or better services at a much lower cost, Local 3 contractors found themselves in the 1990's at a competitive disadvantage and losing business to CWA contractors. (JA-1490; *see also* JA-3062–65.)

A. The Conspiracy to Eliminate Competition.

In or about September 1998, Robert Eccles, Nead's Executive Vice President, complained to Howard Cohen, a Local 3 business agent, that Nead was losing an inordinate number of bids to CWA contractors. (JA-1645.) On September 1, 1998, Eccles

wrote to Mark Hansen, another Local 3 business agent, that "[w]e are losing as much work to CWA as we are winning and [it is] getting worse"; "the amount of work since January that has gone to CWA is staggering." (JA-2529.) In his letter, Eccles solicited a meeting with Local 3 "to discuss this problem and review any recommendations you may have to competing in this marketplace [sic]." *Id.*

Ten days after Eccles' September 1, 1998 letter, Arnold Johnson of IPC prepared a memorandum addressing the same issue. Referencing their ongoing discussions pertaining to this matter, Johnson cited approximately twenty projects which he stated were "bid this year and have been lost by Local #3 to CWA." (JA-2521.) Local 3 responded to these concerns by holding a meeting with Local 3 contractors and representatives of Local 3's hierarchy to discuss the issue. A Nead memo concerning the meeting was entitled "CWA Problem with Respect to Compition [sic] Senario [sic], Procedure When Threatened by CWA and Future of Telecommunications with Local Three?" (JA-2528; *see also* JA-1646–51, 2098–99.)

As reflected in internal documents, deposition testimony and sworn statements, Local 3 and the defendant contractors immediately launched upon an unyielding and extortionistic campaign aimed at promoting fear and intimidation among the close-knit community of building owners, tenants, representatives and general contractors comprising the decision-makers who award subcontracts in New York City. The message quickly became clear: either use Local 3 contractors for tel-data installation or

suffer the consequences. As observed in the *Daubert* approved reports of plaintiffs' expert, Dr. Frederick Dunbar, vandalism and other significant work site disruptions were carried out by Local 3 contractors, including some who had not even bid on the tel-data work.

Threats by project managers, foremen and supervisors employed by the defendant contractors, also serving as Local 3's agents, were systematically conveyed to customers, general contractors and IT consultants both during the bidding process and after CWA contractors had been chosen to perform the tel-data work. Some customers were informed that no Local 3 contractor would perform electrical work as long as a CWA contractor was performing tel-data work. Many succumbed to the pressure not only by rejecting or refusing to consider CWA bids, but by abruptly cancelling existing contracts. Substantial labor disruptions on job sites where CWA contractors had been awarded the tel-data contracts ensued within a few months of the meeting addressing the "CWA problem." (*See, e.g.*, JA-1779–83, 2187, 2221–29. 2554–59.)

Obstructionism carried out by Local 3 and the defendant contractors in the months following the meeting and during other relevant time periods included:

- Work stoppages and delays in delivering labor to construction sites

- Refusals to work overtime

- Shutting down or refusing to turn on power, including to lights and freight elevators, to prevent other trades from performing work

- Refusing to cooperate with CWA contractors or to make electrical preparations necessary for telecommunication cable installation when a CWA contractor was hired to install the cable

- Walking off job sites and calling in sick immediately following the award of tel-data work to CWA contractors or upon their arrival at construction sites

- Breaking into CWA construction vehicles and stealing the equipment of CWA contractors

- Sabotaging tel-data work performed by tel-data contractors, damaging voice and riser cables, and the severing of hundreds of telecommunication cables installed by CWA contractors at different sites

This conduct had its desired effect. Tel-data contracts that had been awarded to USIS were abruptly cancelled for projects at the Sofitel Hotel, the NBC Experience Store, and the AT&T Bush Terminal. Another CWA contractor, Blue Diamond, had tel-data contracts cancelled in a similar fashion for projects for About.com at 1440 Broadway and for Qwest Communications at 32 Avenue of the Americas.

Fred Lott, the coordinator and building supervisor at the Sofitel Hotel, testified at length about slowdowns and other disruptions by Local 3 contractor, Five Star, at his construction project. Lott testified specifically that he was threatened by Rodney Graves, an Assistant Superintendent for Five Star and a Local 3 agent, and was told by Graves that Local 3 would make sure the job was not completed if USIS was given the tel-data contract. Lott testified that Graves made direct threats such as that elevator cables might be cut and that Lott would experience "personal problems" if Local 3 did not get the job. (JA-1992–2000, 2044.) Lott testified that he perceived Graves' statement to be a threat rather than a legitimate warning. After USIS was awarded the tel-data contract, lights and power were shut down and Five Star's Local 3 workers refused to work overtime. Graves then conveyed the message to Sofitel's parent company that "no Local 3 contractor would perform the high voltage work until USIS was removed from the job site and replaced by a Local 3 contractor." (JA-2010–11, 2024.)

Another job awarded to USIS for Information Builders, located at 2 Penn Plaza, had been openly coveted by a Local 3 contractor. Cables not yet installed were damaged and approximately 600 cables that had been installed in the ceiling were cut just before the completion date. (JA-1581–91; *see also* JA-2194, 2200–07.) Sometime after the award of the tel-data contract to USIS, but before the cables were cut, an IT consultant on the project received a telephone call from the President of the Local 3 contractor, who told him "if we don't get this work, the guys are going to be very unhappy." (JA 2197–98.) The damage was

determined to be the result of "a well planned and thought out, non-random deliberate attempt to sabotage the project . . . [where] the perpetrators are people who have intimate details about the cable routing and the project." (JA-2563–65.) Other such examples in the record abound.

Despite invariably submitting substantially lower bids, the plaintiffs began losing bids consistently to Local 3 contractors on tel-data contracts due to what customers perceived as "unacceptable scheduling and sabotage risks." (JA-2462). USIS was rejected despite submitting a bid that was more competitive by almost $1 million on a contract for Credit Suisse First Boston. USIS had an established and favorable relationship with Credit Suisse, having previously worked on three separate tel-data projects at major construction projects for it in New York City. The circumstances under which the Local 3 contractor had prevailed were summarized in a July 30, 2000 email from a Credit Suisse official who characterized its choice as the product of "extortion." (JA-2459.)

USIS also lost out on bids for substantial jobs for Shearman & Sterling in Manhattan, despite a similar positive working relationship with the firm. A Shearman & Sterling manager registered his "emphatic opposition" to giving into Local 3's "illegal and extortionate demands," and added that he was "disappointed that [the general contractor] would ever allow themselves to be used as the conduit for such threats and . . . further disappointed [with the unwillingness] to recommend that we stand on principle." (JA-2571.) At another Manhattan project

where the general contractor had expressed his opposition to using a CWA contractor, the customer, Random House, overlooked savings of over $1 million to "buy labor peace."[1] *Id.*

B. Expert Opinion

Plaintiffs' case included the opinion of a respected expert, Dr. Frederick C. Dunbar, a Senior Vice President of National Economic Research Associates specializing in antitrust and financial economics. Dr. Dunbar's reports, after well over a year of exhaustive hearings and briefings, were *Daubert* approved. Dr. Dunbar calculated the significant price differential in bids between CWA and Local 3 contractors and concluded that the conduct under scrutiny forced building owners to pay higher prices. (JA-3051-54, 3061-65). He further opined that the telecommunications market in New York City did not behave like a normal competitive market, and added "[t]his behavior [by Local 3 contractors] would not be sustainable in a competitive market where customers could choose an electrical installation services firm that would not be threatening vandalism or other disruptive behavior." (JA-3037.)

Dr. Dunbar concluded that Local 3, acting in concert with defendant electrical contractors, engaged in anticompetitive conduct to injure competition in the telecommunications installation services market. He

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1. For the sake of brevity, the Petitioners have not catalogued the myriad of other incidents to which they were subjected.

reached his conclusion after examining conventional "plus factors" suggesting the existence of a conspiracy. He examined specifically whether there was parallel behavior, motive and opportunity, the ability to communicate and behavior that was inconsistent with independent action in a competitive market. . . ." Dr. Dunbar based his conclusions on several factors, including: (1) lack of demarcation between Local 3 and the electrical contractors, (2) communication by defendant electrical contractors of Local 3's threats of possible vandalism and unwillingness to work overtime, (3) the failure to discipline workers who refused to work, and (4) the incentive of defendant electrical contractors that rely on Local 3 labor to act in concert with Local 3 to reduce competition from CWA contractors.

The defendants' economic self-interest was examined by Dr. Dunbar from the appropriate perspective of the incentives that exist in a competitive marketplace. According to Dr. Dunbar, if the Local 3 contractors were actually competing for high voltage electrical work on major projects, their natural incentive would be to deliver timely performance by controlling their workers and minimizing labor disruptions. Dr. Dunbar observed from the extensive record that the defendant contractors never disciplined workers engaged in misconduct, but rather, continued to employ the same core group of workers. This occurred, he noted, despite the contractors' ability to demand overtime on high voltage electrical projects and to enforce discipline by replacing malefactors with readily available labor from the "union hall."

In addition to the Local 3 contractors' failure to discipline or control workers, Dr. Dunbar noted through countless examples that the contractors actively conveyed threats of vandalism and labor disruptions to customers and did so in a manner suggesting to both the customers and their own workers that the conduct was either condoned or being leveraged by the contractors to obtain tel-data in addition to conventional electrical work.

Dr. Dunbar's reports noted significantly that the contractor's key managers wore two hats—representing the contractor while at the same time, as members of the union, representing the union's interests as well. Dr. Dunbar indicated that this, together with the common infrastructure shared by Local 3, the contractors, and institutions such as the Joint Industry Board that are comprised of representatives from electrical contractors and the union, present ideal circumstances for the formation of a cartel and collective anticompetitive undertakings through tacit or informal rather than express agreements. He concluded that this shared infrastructure was an ideal vehicle for facilitating clandestine inter-firm communications and policing agreements or common understandings.

II. PROCEEDINGS BELOW

This action was brought on June 27, 2000. The defendants moved for summary judgment under the labor antitrust exemptions and under *Matsushita*.

The motion was referred to a Magistrate Judge. The defendants' claim to the non-statutory

labor exemption was rejected as "utterly lacking in merit." The Magistrate, nonetheless, recommended summary judgment. His opinion was founded on the fundamental premise that defendants' proffered explanation for their challenged conduct placed a burden on plaintiffs under *Matsushita* to present "direct evidence" of a conspiracy or an agreement among the defendants. Each piece or category of evidence comprising plaintiffs' case, and from which it was acknowledged a conspiracy reasonably could be inferred, was rejected on the grounds that competing inferences could be drawn from the evidence favorable to the defense. The standard was one in which evidence had to either exclude the possibility of independent action or be disregarded in the overall judicial assessment of the sufficiency of evidence.

That concerted action between Local 3 and its contractors which could reasonably be inferred from the uniformity of the defendants' threats to customers and general contractors following the noted meeting, was not appreciated by the Magistrate. Dr. Dunbar's opinions, which had survived consecutive *Daubert* attacks, were not even mentioned. Evidence that threats conveyed by contractors were perceived as such by customers and others to whom they were directed, and were considered to have come from the contractors as well as the union, were also discounted by the Magistrate.

The Magistrate cited the lack of direct evidence that the customers' perceptions or "state of mind" arose as a result of actions of anyone other than Local 3, even though malign intent could easily be inferred from the content of the statements themselves as well

as from the manner and context in which they were delivered.

The Magistrate went so far as to hold that the conveyance of "warnings" or perceived threats by the defendant contractors was in their economic self-interest, as they "stood to benefit directly, because such 'warnings' increased the chances that it would be awarded telecommunications contracts." App. C 48a–49a. The court appeared to concede the inherent unfairness of the defense, without appreciating its fundamental inconsistency with the objectives of the antitrust laws. The Magistrate concluded, based on a piecemeal review of the evidence, that plaintiffs' conspiracy allegations and defendants' claim to independent action were "equally plausible." App. C 49a. The Magistrate's opinion was adopted uncritically by the district court and affirmed by the Second Circuit. A petition for *en banc* review was denied. App 4a.

REASONS FOR GRANTING THE PETITION

I. THE PROPER MEANING OF *KODAK* AND *MATSUSHITA*

In *Kodak*, this Court emphasized that *Matsushita* had not imposed a special burden on antitrust plaintiffs facing summary judgment; it had merely applied a familiar standard of reasonableness to the inferences that are permissible in a case comprised of an implausible economic theory and parallel conduct that was facially pro-competitive:

> Because the defendants had every incentive not to engage in the alleged conduct . . . the Court found an "absence of any motive to conspire." In that context, the Court determined that the plaintiff's theory of predatory pricing was . . . "speculative," and was "not reasonable." Accordingly, the Court held . . . that summary judgment would be appropriate [unless the plaintiffs] came forward with more persuasive evidence to support their theory.
>
> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy, . . . it is entitled to summary judgment. *Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach a jury, a requirement that was not invented, but merely articulated, in that decision.

504 U.S. at 468.

The Court in *Kodak* made it clear that the defendants in *Matsushita* were afforded a legal presumption in favor of summary judgment because of the likelihood that permitting inferences of

concerted action would "deter or penalize" pro-competitive behavior:

> Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy "through evidence of rebates and other price-cutting activities." Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly" and would "chill the very conduct the antitrust laws were designed to protect. . . ."

Id. at 478.

Conversely, the Court denied Kodak the same legal presumption because it determined *Matsushita*'s deterrence concerns were not implicated by a challenged policy it found facially anticompetitive and "exactly the harm the antitrust laws aim to prevent":

> Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of determining procompetitive conduct . . . the facts in this case are just the opposite. The alleged conduct-higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this case, *Matsushita* does not create

> any presumption in favor of summary judgment for the defendant.

Id.

The facially anticompetitive nature of the challenged conduct was held in *Kodak* to be dispositive grounds for the denial of summary judgment. *Id.* at 479. The Court formulated a presumption against summary judgment and placing any limits on otherwise permissible inferences where there is no significant likelihood of punishing or deterring pro-competitive conduct. *Id.* at 478. The Court stated that in weighing "the risk of deterring procompetitive behavior by proceeding to trial against the risk that the illegal behavior will go unpunished, the balance tips" in favor of summary judgment only when the challenged conduct "appears always or almost always to enhance competition." *Id.*

The balance between deterrence concerns and "the desire that illegal conspiracies be identified and punished," was found to be "unusually one-sided" in favor of summary judgment in *Matsushita.* 475 U.S. at 594. This was due substantially to the inherently pro-competitive and socially beneficial nature of the defendants' challenged price cutting and rebate activities. Referring to price cutting as "the very essence of competition," the Court in *Matsushita* observed that mistaken inferences in predatory pricing cases were especially costly "because they chill the very conduct the antitrust laws are designed to protect." *Id.* (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

The implausibility of the plaintiffs' predatory pricing theory played an equally significant role in *Matsushita*. The Court cited a consensus of authoritative commentary for the proposition that predatory pricing conspiracies are by nature speculative, and thus "rarely tried, and even more rarely successful." *Id.* at 589. The Court went on to consider the "incalculably" greater difficulty of a large number of firms executing such a conspiracy over a prolonged period spanning two decades. *Id.* at 590. The Court concluded that the defendants had "no motive" to enter into the alleged conspiracy, and "every incentive" not to engage in the alleged below cost pricing because its likely effect would be to generate losses with no corresponding gains. *Id.* at 595.

The requirement that plaintiffs must present evidence "that tends to exclude the possibility that the alleged conspirators acted independently" was thus introduced in *Matsushita*, not only in connection with challenged conduct which always or almost always appears to enhance competition, but in an overwhelmingly one-sided case. *Id.* at 601 n.1 (quoting *Monsanto*, 465 U.S. at 764). Direct evidence was necessary to make the inference of conspiracy reasonable in light of competing inferences of independent action arising from the alleged conspiracy's factual and theoretical implausibility.

It was in this context that the Court in *Matsushita* linked the "tends to exclude" standard to settled precepts of summary judgment jurisprudence. *Id.* at 588. Alluding to authorities on such basic Rule 56 requirements as the need for "specific facts" and

showing a "genuine issue for trial," the Court in *Matsushita* explained that if in its factual context the plaintiff's case "simply makes no economic sense," more persuasive evidence is required to support the claim than would otherwise be necessary. *Matsushita*, 475 U.S. at 587. Therefore, properly understood, *Matsushita* and *Kodak* are not only capable of being reconciled, but also harmonized with conventional summary judgment standards. The requirement for direct rather than circumstantial evidence that "tends to exclude" the possibility of independent action, is required only when deterrence concerns are implicated by the factual setting or when the case is factually or theoretically implausible.

II. THE LONG-STANDING CONFLICT AMONG THE CIRCUITS

A. Leading Decisions Espousing the Proper View

Had the courts below properly focused on the core concerns of plausibility and deterrence and applied a conventional summary judgment standard, the lower court decisions in this case would have been different. The denial of defendants' motion for summary judgment would have been compelled under applications of *Matsushita* and *Kodak* prevailing in the Third and Seventh Circuits, under respected precedent formerly prevailing in the Ninth Circuit, and under prominent decisions of panels in the Tenth and Eleventh Circuits and elsewhere.

i. Seventh Circuit

In one of the most recent and influential decisions adhering to the proper view of *Kodak* and *Matsushita*, Judge Posner, in *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655 (7th Cir. 2002), found the requirement for additional evidence of conspiracy under the "tends to exclude" standard to be tied closely to the plausibility of the charge of collusion. He interpreted *Matsushita* to prescribe a sliding scale approach under which "[m]ore evidence is required the less plausible the charge of collusive conduct." *Id.* at 661. Based on the inherent plausibility of a "garden-variety price-fixing conspiracy," Judge Posner reversed summary judgment holding that the trial court had erred both in reading a heightened burden into the "tends to exclude" standard and in rejecting individual pieces of evidence on grounds of ambiguity. *Id.*

Judge Posner specifically noted that direct evidence of an agreement between the defendants was unnecessary and that a case comprised exclusively of circumstantial evidence in which the existence of an agreement is reasonably inferred is sufficient to defeat summary judgment. *Id.* at 634. This point was underscored by Judge Posner's warning about the "traps" to be avoided by district courts "in evaluating evidence of an antitrust conspiracy." *Id.* at 655. He identified the first "trap" as "weigh[ing] conflicting evidence," which he described as "the job of the jury." *Id.* The second "trap," he said, "is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment." *Id.* Judge

Posner indicated that courts falling into either "trap" supplant the role of a jury:

> It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial?

Id. at 655–66.

In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778–79 (7th Cir. 1999), Judge Posner similarly described *Matsushita* as "teach[ing] that an antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment" and held that even if there was "an innocent explanation for" the defendant's conduct, the issue on summary judgment was "whether a rational jury . . . could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the [defendant's acts] . . . was that they were [conspiring]." *Id.* at 777–78. In *JTC Petroleum*, circumstantial evidence was found to support the defendants' inherent motive to enlist a captive market of suppliers to assist in enforcing a cartel by punishing mavericks through either coercion or economic inducement.

In another case, *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir. 1997) ("*Brand I*"), Judge Posner explained in reversing summary judgment that it does

not matter whether the evidence of conspiracy was "susceptible of an innocent interpretation," only whether there was sufficient evidence in the record. The Court observed that while the defendants' interpretations may be correct, they are not inevitable. *Id.*

In a later case by the same name, *In re Brand Name Prescription Drugs Litigation*, 186 F.3d 781, 785 (7th Cir. 1999) ("*Brand II*"), the Seventh Circuit indicated that parallel oligopoly pricing could be proven to be the result of concerted rather than independent conduct through either direct or circumstantial evidence.

ii. Third Circuit

The Third Circuit has long applied a "sliding scale" to the sufficiency of evidence which is gauged in accordance with the presence or absence of both plausibility and deterrence concerns as defined in *Matsushita* and *Kodak*. The approach was articulated succinctly in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), wherein the court instructed that "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences." *Id.* at 1232 (internal citations omitted). The court in *Petruzzi's* expressly identified plausibility and deterrence concerns as the two principal factors underlying *Matsushita*. *Id.* Citing *Kodak*, the court emphasized that *Matsushita* "did not hold that an antitrust defendant is entitled to summary judgment merely by providing *an* economic

theory to justify its behavior," but simply stressed that to survive summary judgment in the absence of direct or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible. *Id.* at 1231. The court also reaffirmed that "'[a] non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case.'" *Id.* at 1229 (internal citation omitted).

As distinct from *Matsushita*, plaintiff's theory in *Petruzzi's* was not implausible and "the defendants' challenged activities [were] not pro-competitive." *Id.* at 1232. Accordingly, the court stated "more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing [such] inferences . . . [were] not present." *Id.* The need for "sufficiently unambiguous" evidence that the defendants conspired in *Matsushita* was attributed to the "absence of a plausible theory of conspiracy." *Id.* at 1233. The *Petruzzi's* court went on to distinguish "sufficiently unambiguous evidence" from "direct evidence," noting significantly with regard to the latter, "the strictures of *Matsushita* [do] not apply," because both are "sufficiently unambiguous." *Id.* This point was underscored by the *Petruzzi's* court's observation that where such concerns are minimal or non-existent, a sufficiently unambiguous and even "compelling" case could be made from the totality of individual pieces of evidence which are ambiguous when viewed in isolation.

In decisions since *Petruzzi's*, the Third Circuit has applied a consistent standard under *Kodak* and *Matsushita* that imposes a higher burden on a

plaintiff opposing summary judgment under the "tends to exclude" standard only where plaintiff's theory is implausible and challenges pro-competitive activities. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994); *Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191, 1196–97, 1205 (3d Cir. 1995); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466–67 (3d Cir. 1998); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999). These principles were reaffirmed by the Third Circuit more recently in *In re Flat Glass Antitrust Litigation*, 385 F.3d 350 (3d Cir. 2004).

iii. Ninth Circuit

Similar principles were earlier espoused by the Ninth Circuit in *In re Coordinated Pre Trial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990). Although abrogated by the Ninth Circuit's decision in *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), *Petroleum* is a thoughtful decision which is often cited and remains highly respected and influential. Under *Petroleum*, "the key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence . . . [and the] 'inferences' possible anti-competitive side-effects." *Petroleum*, 906 F.2d at 439.

Petroleum expressly rejected the notion that summary judgment should be granted "whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are *equally plausible*."

Id. at 438 (emphasis added). The Ninth Circuit reasoned that permitting a court to make that decision "would lead to a dramatic encroachment upon the province of a jury":

> To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more "consistent" with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.
>
> * * *
>
> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that

> is plausibly consistent with competing inferences.

Id. at 438.

iv. Other Federal Courts

In *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 572 (11th Cir. 1998), the Eleventh Circuit held that "for all the inadequacies of the record," there was sufficient evidence to proceed to trial in an alleged price-fixing conspiracy that was supported entirely by circumstantial evidence. In *In re Vitamins Antitrust Litigation*, 320 F. Supp. 2d 1, 13 (D.D.C. 2004), the "sliding scale" approach to the sufficiency of circumstantial evidence was expressly adopted by the District Court for the District of Columbia. Under *Vitamins*, the proper reading of *Matsushita* is that if the alleged "conspiratorial actions" do not merit a presumption of pro-competitive conduct, the "[p]laintiffs are entitled to the benefit of a jury determining inferences rather than the Court doing so at the summary judgment stage." *Id.* at 23; *see also Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006).

B. The Mistaken View of Other Circuits

The sharp split among the Circuits as to the meaning and application of *Kodak* is reflected in the contrast between the prevailing interpretations in the Third, Seventh, Eleventh Circuits and others. Many courts have failed to reconcile *Kodak* and *Matsushita*, or to apply a unified understanding of the decisions. There is a general tendency among some jurisdictions

to rely on one or the other to justify either the granting (*Matsushita*) or denial (*Kodak*) of summary judgment. The varying approaches range from the purely *ad hoc*, to those which appear calculated to encroach upon the province of the jury.

The most extreme examples of the latter are the Fourth and Eighth Circuits. Both have endorsed a summary judgment standard that involves weighing circumstantial evidence and construing competing inferences in the defendant's favor. *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98–2847, 1999 U.S. App. LEXIS 21487, at *21–22 (4th Cir. Sept. 7, 1999); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs, Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997); *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995); *Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993).

The Eighth Circuit has been criticized specifically for its *en banc* decision in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000). By a bare 6-5 majority, the Eighth Circuit overruled the panel in an oligopoly price-fixing case where there was strong circumstantial evidence of a conspiracy. The Sixth Circuit has similarly imposed on plaintiffs the burden of disproving the non-conspiratorial explanation. *See Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir. 1999).

There are also splits even within circuits, typified by the Ninth Circuit's abrogation of *Petroleum*, in *Citric Acid*, and Eleventh Circuit

decisions in *Harcros*, and *Williamson Oil Co., Inc. v. Phillip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003), which are difficult to reconcile. Although the Second Circuit has subscribed to the broader view of *Matsushita* in this case and others, *Apex Oil Co. v. DiMauro*, 822 F.2d 246 (2d Cir. 1987), holds that the weight assigned to competing inferences remains within the province of a jury, notes that circumstantial evidence is sufficient where, as here, there are traditional "plus factors" and reaffirms the conventional summary judgment standard and the notion that conspiracy evidence must be examined as a whole and not in isolation.

The need for Supreme Court review to resolve the uncertainty is illustrated by the number of petitions presented on both sides of the *Matsushita* issue. They include petitions in *Alvord-Polk*, *High Fructose Corn Syrup*, *Flat Glass*, *Petroleum*, *Citric Acid*, *Blomkest*, and *SMS Systems Maintenance Services, Inc. v. Digital Equipment Corp.*, 188 F.3d 11 (1st Cir. 1999), among others. Although it is not unusual to allow an issue to mature, this one has had full time to germinate and is now ready for adjudication. This petition presents the Court with the opportunity to insure the uniform administration of justice in cases where *Matsushita*'s core concerns are not implicated in a factual and legal setting which could not be more remote from those considerations.

III. THE IMPROPER STANDARD APPLIED BELOW

This petition is distinguishable from virtually all others involving *Matsushita*'s application in parallel conduct cases. Unlike all other cases involving a disputed application of *Matsushita*, the fact-finder in this case would be presented with a choice of competing explanations which would both involve unlawful and facially anticompetitive overt conduct. Moreover, because of their close association with the direct perpetrators, and intimate relationships with each other, the defendants would be implicated in the unlawful conduct regardless of the verdict. A trial on the merits would feature a seemingly unprecedented defense which would have the principal competitive and economic beneficiaries of facially anticompetitive conduct claiming that it was in their self interest and thus permissible for them to both tolerate and engage in actions which advanced the objectives of the conduct on the grounds that members and employees under their supervision who were directly involved were beyond their control.

If the Court's decision in *Kodak* is to have any meaning and application in Section 1 cases, then this surely presents an instance where, given its factual setting, the legal presumption on motion for summary judgment should have been in favor of plaintiffs. The alleged conspiracy in this case obviously is plausible from the perspective of common experience and the legal and historical record. The balance of the "risk of deterring pro-competitive behavior" and the "risk that unlawful behavior will go unpunished" completely and dramatically favors plaintiffs. 504 U.S. at 479. The

challenged conduct is without social value, and is indefensible from the standpoint of competition. The possibility of mistaken inferences thus poses no concern for the objectives of the antitrust laws.

Conversely, allowing the unlawful and egregious criminal conduct to go unpunished will result in the entrenchment of an anticompetitive market structure and the perpetuation of artificially inflated prices. An "incorrigible" and "recidivist" union, moreover, will remain free to pursue and realize its goal of achieving exclusive dominion over commerce beyond its trade jurisdiction in defiance of federal authority. In a case involving allegations which the trial court acknowledged were plausible, and where deterrence considerations so decisively favor the plaintiffs, the focus below under *Kodak* should have been on the sufficiency of plaintiffs' evidence and the reasonableness of their sought after inferences under conventional Rule 56 standards.

A. The Petition Should be Granted to Prevent Further Encroachment by Federal Courts on the Province of a Jury and the Erosion of Fundamental Precepts of Summary Judgment Jurisprudence

Had a conventional approach to summary judgment been taken, this case undoubtedly would have been permitted to proceed to trial. Plaintiffs were found to have presented substantial evidence from which reasonable inferences supporting a conspiracy could be drawn. The trial court determined that plaintiffs presented substantial evidence of a

conspiracy which would be sufficient to proceed to trial had it not felt constrained to limit otherwise permissible inferences. App. C 51. This alone should have been enough to sustain plaintiffs' case under the appropriate "sliding scale" standard, given the broad range of inferences the absence of deterrence and plausibility concerns should have entitled the plaintiffs.

Nevertheless, the finding of evidential equality itself rested on an equally flawed legal premise. Falling simultaneously into two of Judge Posner's proverbial "traps," the trial court not only weighed evidence in isolation but did so based on an improper supposition that if a piece or category of evidence did not point unequivocally to conspiracy, then it was deemed to be of "equal" probative weight and discarded. There was no attempt to assess evidence in relationship to other evidence and the balance of plaintiffs' case, or to examine and weigh the reasonableness and probative value of competing inferences from even the isolated perspective of this fragmented approach.

Thus, the trial court not only supplanted the fact-finding role of the jury, but substituted a methodology for fact-finding which is inherently inferior to the norms observed by juries. The piecemeal examination of conspiracy evidence was categorically rejected by the Court nearly 50 years ago in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), wherein the Court stated:

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing it as separate parts, but only by looking at it as a whole.

Id.

The correct standard for summary judgment is not one in which the evidence of parallel conduct or conspiracy is "susceptible [to] an innocent interpretation"; it is "whether there is sufficient evidence of [collusion] to create a jury issue. . . ." *Brand I*, 123 F.3d at 614; *see also Petruzzi's*, 998 F.2d at 1230 (holding that plaintiff need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the mere scintilla standard); *Flat Glass*, 385 F.3d at 368 (rejecting defendant's proposal to conduct a piecemeal examination of evidence, disregarding the pieces that could feasibly be interpreted as consistent with the absence of an agreement); *Harcros*, 158 F.3d at 548.

Interpretations of the "tends to exclude" standard such as applied below have been described by leading commentators as effectively requiring antitrust plaintiffs to disprove the defendant's case. Judge Posner has observed that "[i]t is unusual to require a plaintiff as part of his burden of proof to prove a sweeping negative." RICHARD A. POSNER, ANTITRUST LAW, 100 (2d ed. 2001). He has

characterized the effect of having to exclude the possibility of independent action as higher than the criminal standard of proof:

> That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

Brand II, 186 F.3d at 787.

B. The Petition Should be Granted to Clarify The Meaning of *Matsushita* in a Novel Legal Setting and Prevent The Decision From Being Construed To Encourage and Condone Illegal and Anticompetitive Behavior

The courts below not only failed to calibrate the range of permissible inferences in accordance with the lack of plausibility and deterrence concerns; they failed to account in any way for the meaningful distinctions between plaintiffs' particular antitrust claims and the oligopoly price-fixing cases from which a requirement for direct evidence appears to have been borrowed. As the Third Circuit observed in *Flat Glass*, the caution of courts subscribing to the broader view of *Matsushita* in accepting inferences from circumstantial evidence has evolved largely in

oligopoly price–fixing cases due to the economic theory of interdependence espoused in the scholarship of noted academic Donald Turner. *Flat Glass*, 385 F.3d at 360 (internal citations omitted). According to some, a distinction requiring greater circumspection in oligopoly price–fixing cases is that the two "plus factors" generally considered to be the most persuasive evidence of conspiracy—motive to conspire and acts against self-interest—are often indications of nothing more than interdependence. *Id.* (citing POSNER, ANTITRUST LAW at 100).

It was with respect to this view, and the development of the "tends to exclude" standard in oligopoly price-fixing cases, that Judge Posner offered the following criticism:

> Most courts mistakenly regard tacitly collusive behavior as independent and therefore infer from the dictum in *Monsanto* that the plaintiff must negate the possibility that supra-competitive pricing was achieved without explicit agreement. This produces the paradox that the more conducive the market's structure is to collusion without express communication, the weaker the plaintiffs' case.

POSNER, ANTITRUST LAW at 99–100.

Judge Posner's comments reflect an emerging view that under a proper reading of *Kodak* and *Matsushita*, evidence of oligopoly parallel pricing, combined with a market structure conducive to

collusion, should be enough to defeat summary judgment. This view is founded not only on skepticism of "interdependence" as a dated economic theory, but on the grounds that parallel pricing, even when engaged in benignly, is "socially useless behavior" with no possible pro-competitive benefits. Professor Hovenkamp has explained that "[c]ourts should also be less reluctant to condemn a business practice that has no obvious social . . . benefits" because there is no danger that a false positive is going to discourage socially useful conduct. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 136 (2005).

The courts below should have freshly examined these criticisms in relation to the distinct and peculiar nature of plaintiffs' claims. Apart from challenging unquestionably malign and socially useless behavior, the conspiracy alleged by plaintiffs is not remotely comparable to oligopoly parallel pricing. Plaintiffs allege a conspiracy which more directly resembles an illegal group boycott, or concerted refusal to deal, such as in *JTC Petroleum* and *Champagne Metals*, with the added dimension of union coercion and an attempt at market dominance analogous respectively to *Allen Bradley*, *MCM Partners*, *Altemose Constr. Co.*, and *C&W Constr. Co.*

In group boycott cases, conventional pre-*Matsushita* "plus factor" evidence such as "motive to conspire," "market conduciveness," and—when viewed from the proper perspective of a presumed competitive market—actions against self-interest, have been held to sustain a claim to trial. *Champagne*, 458 F.3d at 1085; *JTC Petroleum*, 190 F.3d at 778–79.

In the union coercion cases, the focus has been on either the relationship between coercive acts and interference with a competitor's targeted contractual and business relationships, or the effect on the marketplace of agreements or commercial understandings between the union and its contractors, and possible other third parties.

In *Champagne Metals*, circumstantial evidence was deemed sufficient to proceed to trial largely because the alleged conduct was facially anticompetitive and the defendants had an economically rational motive to keep aggressive competitors out of the marketplace. 485 F.3d at 1086 (internal citation omitted). Similarly, in *JTC Petroleum*, a market structure conducive to collusion and the inherent motive of established firms to exclude upstart competitors, were sufficient to defeat summary judgment.

As noted, relevant and admissible "plus factor" evidence was submitted by plaintiffs in this case through their expert, Dr. Dunbar. Dr. Dunbar presented persuasive opinion evidence that the parochial and union-dominated relevant market was conducive to collusion, and that the defendants' had a motive to conspire. His reports confirmed that Local 3 was ideally suited to serve as a catalyst for the conspiracy because of the value of its reputation and ability to intimidate. They further indicated that union institutions provided a common professional infrastructure shared by the defendants which both optimized the opportunity for covert or tacit communications and was an effective instrument for enforcing illicit agreements or understandings among

the defendants. The reports attested to the defendants' self-evident motive to collude in order to thwart competition from CWA contractors. They concluded that the defendants' conduct could only be explained in terms of collusion or their complicity with an anti-competitive environment which they have contributed to and consciously exploited.

The unwillingness of the courts below to address Dr. Dunbar's reports despite finding them competent and admissible, can only be attributed to misguided deference to the labor antitrust exemptions. Once it was determined that defendants' challenged conduct was beyond the exemptions, reasonable inferences arising from the reality of the interconnectivity between Local 3 and its various signatory contractors should have been more freely permitted. Inferences flowing from Local 3's adjudicated history of its relentless pursuit of exclusive dominion over the tel-data market through illegal secondary boycott activity should have been permitted as well.

The courts below also failed to truly appreciate the implications of the defendant contractors' "independent action" defense. The defense rests on a claim to economic self-interest which assumes an anticompetitive environment in which the contractors are complicit. The contractors' behavior is explained purely in terms of dealing with the reality of this environment. According to the narrative, the union and its members cannot be controlled, and any actions by the contractors that normally would be expected in a competitive environment—such as punishing or disciplining workers, or replacing them through other

available union labor—would be met with resistance and ultimately retribution by the union or its members.

Thus, the contractors must not only resign themselves to the misconduct of the union and its membership, they must condition customers, consultants and general contractors comprising the balance of the relevant market to accept and succumb to this reality as well. Especially given that there are great benefits to be gained by the defendant contractors from this conditioning, and their acquiescence to Local 3's coercion, the defendant contractors are not beyond accountability under the antitrust laws.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

LAURA G. WEISS, ESQ.
LAW OFFICES OF
LAURA G. WEISS
One Blue Hill Plaza
Pearl River, NY 10965

MAXWELL M. BLECHER, ESQ.
JOHN E. ANDREWS, ESQ.
BLECHER & COLLINS, P.C.
515 South Figueroa Street
Suite 1750
Los Angeles, CA 90071

SHALOM D. STONE, ESQ.
ROBERT J. DONAHER, ESQ.*
STEVEN D. GROSSMAN, ESQ.
WALDER, HAYDEN
& BROGAN, P.A.
5 Becker Farm Road
Roseland, NJ 07068
(973) 992-5300

*Counsel of Record

Counsel for Petitioners